No. 89-1416

In the Supreme Court of the United States

OCTOBER TERM, 1990

AIR COURIER CONFERENCE OF AMERICA, PETITIONER

v.

AMERICAN POSTAL WORKERS UNION, AFL-CIO, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES POSTAL SERVICE AS RESPONDENT SUPPORTING PETITIONER

JOHN G. ROBERTS, JR.
Acting Solicitor General

STUART M. GERSON
Assistant Attorney General

PAUL J. LARKIN, JR.
Assistant to the Solicitor General

MICHAEL JAY SINGER
JEFFRICA JENKINS LEE
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether employees of the United States Postal Service, through their unions, can bring suit under the Administrative Procedure Act to challenge a Postal Service regulation permitting private mail services to engage in international remailing.

2. Whether the Postal Service acted arbitrarily and capriciously in promulgating its international remailing regulation.

PARTIES TO THE PROCEEDINGS

The petitioner is the Air Courier Conference of America, a trade association with approximately 150 members. Respondents are the American Postal Workers Union, AFL-CIO, the National Association of Letter Carriers, AFL-CIO, and—pursuant to Sup. Ct. R. 12.4—the United States Postal Service.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, regulations, and rule:

Statutes, regulations, and rule—Continued: Page

Statutes, regulations, and rule—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 891 F.2d 304. The opinion of the district court (Pet. App. 28a-38a) is reported at 701 F. Supp. 880.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1989. The petition for a writ of certiorari was filed on March 8, 1990. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reprinted in an appendix to this brief.

STATEMENT

1. Since the days of the Articles of Confederation, the United States Postal Service has exercised a monopoly over the carriage of letters in and from the United States. The postal monopoly is codified in a group of statutes known as the Private Express Statutes (PES), 18 U.S.C. 1693-1699 and 39 U.S.C. 601-606, which generally prohibit the establishment of any private express for the conveyance of letters or packets of letters over postal routes. Congress created the monopoly as a revenue protection measure for the Postal Service. It prevents private competitors from offering service on low-cost routes at prices below those of the Postal Service, while leaving the Service with high-cost routes and insufficient means to fulfill its mandate of providing uniform rates and "prompt, reliable, and efficient services to patrons in all areas," including remote or less populated areas. *Regents of the University of California* v. *Public Employment Relations Board*, 108 S. Ct. 1404, 1408 (1988) (quoting 39 U.S.C. 101(a)). See also J. Haldi, *Postal Monopoly: An Assessment of the Private Express Statutes* 9 (1974); Craig & Alvis, *The Postal Monopoly: Two Hundred Years of Covering Commercial as Well as Personal Messages*, 12 U.S.F. L. Rev. 57, 60 & n.8 (1977) (discussing legislative history). The dispute in this case involves a provision of the PES that authorizes the Postal Service to "suspend [the Private Express restrictions] upon any mail route where the public interest requires the suspension." 39 U.S.C. 601(b).

In 1979 the Postal Service suspended the PES restrictions for "extremely urgent letters," thereby allowing overnight delivery of letters by private courier services. 39 C.F.R. 320.6 (1989); 44 Fed. Reg. 61,178 (1979).[1]

[1] The suspension was enacted in response to congressional concern that the Postal Service was not adequately serving the needs of businesses with time-sensitive materials. See *Private Express Statutes: Hearings Before the Subcomm. on Postal Operations and Services of the House Comm. on the Post Office and Civil Service*, 96th Cong., 1st Sess. 21-22 (statements of Chairman Wilson), 333-334 (statements of Postmaster General Bolger) (1979). Also excepted from the PES are letters of student and faculty organizations, 39 C.F.R. 320.4, letters accompanying cargo, 39 U.S.C. 602(a)(2); 39 C.F.R. 310.3(a), letters carried by special messenger, 18 U.S.C. 1696(c); 39 C.F.R. 310.3(d), and letters carried to a post office, 18 U.S.C. 1696(a); 39 C.F.R. 310.3(e).

Private courier services relied on that supension to engage in a practice called "international remailing," in which private courier services deposit with foreign postal administrations letters destined for foreign addresses, thereby bypassing the Postal Service entirely. Believing that international remailing was a misuse of the urgent letter suspension, the Postal Service issued a proposed modification and clarification of its regulation in order to make clear that the suspension for extremely urgent letters did not cover this practice. 50 Fed. Reg. 41,462 (1985).

The comments received in response to the proposed rule were overwhelmingly negative. Of more than 80 comments received from the public all but two, see 2 C.A. App. 101, 107, opposed the proposed rule. 2 *id.* at 102-106, 108-456. See also 51 Fed. Reg. 29,636 (1986). Most of the opposition focused on the perceived benefits of international remailing, including lower cost, faster delivery, greater reliability and responsiveness, and the enhanced ability of United States companies to remain competitive in the international market. 2 C.A. App. 102-106, 108-456. Various sources in the Executive and Legislative Branches also provided comments, citing the benefits inherent in competition from the remailing industry and the increased competitiveness of United States firms abroad. 2 *id.* at 111, 113, 420, 428, 433-456, 473-478, 527; Hawley Decl. para. 7, J.A. 120. Neither of the respondent unions[2] submitted comments in response to the proposed rule.

Because of the vigorous opposition to the proposed rule, the Postal Service agreed to reconsider its position and

[2] Although the Postal Service is also a respondent in this case pursuant to Sup. Ct. R. 12.4, we will use the term "respondent" only in connection with the respondent unions.

instituted a rulemaking "to remove the cloud" over the validity of the international remailing services. 51 Fed. Reg. 9852, 9853 (1986).[3] Following this notice, 12 comments were received, 2 C.A. App. 470-534, only one of which opposed the practice of international remailing, 2 *id.* at 485. The comments again focused on the lower costs, greater speed, and better service that remailers were thought to provide. 2 *id.* at 470-484, 486-534. To supplement the record further, to gain additional insight into the practice of international remailing, and to receive suggestions regarding the form that a suspension might take, the Postal Service gave notice of, 51 Fed. Reg. 17,366 (1986), and subsequently held a public meeting on May 22, 1986. 2 C.A. App. 541-603 (transcript). See Hawley Decl. para. 10, J.A. 121.

One month later, on June 17, 1986, the Postal Service issued a proposal, accompanied by a statement of reasons, to suspend operation of the PES for international remailing. 51 Fed. Reg. 21,929-21,932 (1986). Nine comments were received in response to the proposed rule, 2 C.A. App. 633-677, only one of which, from the respondents, opposed it, J.A. 85-96. 51 Fed. Reg. 29,636 (1986). Although the comments concerning the economics of international remailing were not as responsive, precise, and detailed as the Postal Service had hoped, the Service nevertheless concluded that it had "compiled a record which appears to demonstrate the existence of a public benefit and to support the suspension." 51 Fed. Reg. at 29,637; Pet. App. 23a. Accordingly, the Postal Service issued a final rule suspending the operation of the PES in relation to international remailing services.

2. Two postal worker unions brought this action in district court, challenging the international remailing regulation on the ground that the rulemaking record was inadequate to support a finding that the suspension of the

[3] In addition to the public notice, each person who had submitted comments in response to the original notice of proposed rulemaking was sent a letter soliciting information regarding remailing. 51 Fed. Reg. at 9852.

PES for international remailing was in "the public interest." The unions alleged that their claims arose under the Private Express Statutes and regulations, the Declaratory Judgment Act, 28 U.S.C. 2201, and the Mandamus Act, 28 U.S.C. 1361. Compl. 1 (dated Nov. 16, 1987); J.A. 107. They did not allege that their claims arose under the Administrative Procedure Act (APA), 5 U.S.C. 701-706. See J.A. 107.

The district court dismissed the unions' complaint on two grounds. The court first held that while the postal workers' interest in job security was sufficient to establish Article III standing, the unions did not satisfy prudential standing limitations. Specifically, the court held that the unions' interest in preserving employment opportunities with the Postal Service did not fall within the "zone of interests" protected by the Private Express Statutes. Pet. App. 30a-34a. Second, the district court held that even if the unions' complaint were considered on the merits, the Postal Service's decision was not arbitrary and capricious, and was based on an adequate rulemaking record. *Id.* at 34a-38a.

3. The court of appeals reversed. Pet. App. 1a-18a. It held that the unions satisfied the zone of interests requirement for APA review under *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388 (1987), and that the Postal Service's regulation was arbitrary and capricious, because the Service relied on too narrow an interpretation of "the public interest."

On the standing question, the court noted, Pet. App. 4a, that "[a]lthough the USPS is exempt from the strictures of the Administrative Procedure Act ('APA'), *see* 39 U.S.C. § 410(a), it has chosen to follow APA procedures when promulgating rules affecting the PES. *See* 39 CFR 310.7 (1988)." The court therefore concluded that Section 702 of the APA, 5 U.S.C. 702, and the "zone of interests" test which this Court has recognized as "a gloss on § 702 of the APA," Pet. App. 6a, applied to this case.

In determining that the interest in employment opportunities was protected by the PES, the court observed

that the PES were re-enacted as part of the Postal Reorganization Act (PRA), Pub. L. No. 91-375, 84 Stat. 719 (1970) (codified at 39 U.S.C. 101-5605). A "key impetus" and "principal purpose" of the PRA, in turn, was "to implement various labor reforms that would improve pay, working conditions and labor-management relations for postal employees." Pet. App. 8a. Reasoning that "[t]he Unions' asserted interest is embraced directly by the labor reform provisions of the PRA" and that "[t]he PES constitute the linchpin in a statutory scheme concerned with maintaining an effective, financially viable Postal Service," the court concluded that "[t]he interplay between the PES and the entire PRA persuades us that there is an 'arguable' or 'plausible' relationship between the purposes of the PES and the interests of the Union[s]." *Id.* at 8a-9a. The court also held that "the revenue protective purposes of the PES, standing alone, plausibly relate to the Unions' interest in preventing the reduction of employment opportunities," since "postal workers benefit from the PES's function in ensuring a sufficient revenue base" for the Postal Service's activities. *Id.* at 9a.

On the merits, the court of appeals held that the Postal Service had considered only the cost savings and service benefits to the international business sector from the suspension of the PES in favor of private international remailing, and had not adequately considered the effect of the regulation "on those [other] consumers who would continue to use the Postal Service, both from a price and service perspective." Pet. App. 14a. The court therefore remanded the case to the Postal Service for it to reconsider that issue. *Id.* at 16a.

SUMMARY OF ARGUMENT

I. The unions cannot bring this action under the APA. Congress "preclude[d] judicial review" under the APA, 5 U.S.C. 701(a)(1), by enacting 39 U.S.C. 410(a), which provides that Chapters 5 and 7 of Title 5 do not apply to the Postal Service. Chapters 5 and 7 of Title 5 are the provisions of the APA dealing with "Administrative Procedure" (Chapter 5) and "Judicial Review" (Chapter 7). Although the Postal Service by regulation has chosen to follow APA rulemaking procedures, that regulation does not incorporate the judicial review provisions of the APA. Moreover, even if the APA were applicable, the unions' interest in protecting the job security of its members is not within the "zone of interests" of the PES. The PES were designed to enable the Postal Service to obtain sufficient revenue to serve the entire Nation at a uniform rate, not to protect job opportunities for postal workers. The court of appeals erred in relying on the labor reform provisions of the Postal Reorganization Act. The "relevant statute" under the APA, 5 U.S.C. 702, is the law whose violation forms the legal basis for the plaintiff's complaint. *Lujan* v. *National Wildlife Fed'n*, No. 89-640 (June 27, 1990), slip op. 9-10, 12. The labor reform provisions of the Postal Reorganization Act are not "relevant statute[s]," since the unions have asserted no violation of those laws.

The unions also cannot bring suit under the PES. The PES do not supply the unions with an express cause of action, and no cause of action can be implied under those laws. It is doubtful that the courts should ever imply a private right of action against the federal government. An implied right of action is generally unnecessary because the APA provides an express cause of action. In addition, if Congress has precluded review under the APA, that action signals Congress's intent that an alleged violation of federal law should not be remedied at the behest of private parties through the federal courts. In any event, nothing in the text, the purposes, or the legislative history of the PES suggests that Congress intended

those laws to grant private parties rights they could enforce in the courts. The PES were adopted for the benefit of the public, not postal employees.

Nor can the unions obtain relief under the Mandamus Act or the Declaratory Judgment Act. Mandamus is warranted only if the defendant owes the plaintiff a clear, nondiscretionary duty. That is not the case here. The Postal Service interpreted the "public interest" provision in 39 U.S.C. 601(b), which requires the Service to act in the interest of the public, not postal employees. Even if the Postal Service made the wrong decision, its action is not subject to mandamus. The Declaratory Judgment Act does not assist the unions. It authorizes a particular form of relief and does not create a cause of action.

II. The Postal Service reasonably suspended its monopoly in order to permit international remailing. The comments received from private parties and public officials overwhelmingly endorsed international remailing on the grounds that it was less expensive and more efficient than services offered by the Postal Service, and would enhance the ability of American firms to compete internationally. The Postal Service considered those comments and modified its proposal accordingly. In so doing, the Service considered the effect on its revenue from a suspension. The Service did not have as extensive or precise a factual basis as it would have liked, but the Service concluded that it had a sufficient basis to make a public interest judgment. The Service used a "worst case" scenario to estimate the total revenue loss, and concluded that the loss from international remailing was not so great as to threaten its ability to carry out its responsibilities. That judgment is entitled to deference and should be upheld.

ARGUMENT

I. THE UNIONS CANNOT BRING THIS SUIT TO CHALLENGE THE POSTAL SERVICE'S REGULATION SUSPENDING THE PRIVATE EXPRESS STATUTES FOR INTERNATIONAL REMAILING

The first question in this case is whether the respondent unions can bring this lawsuit to challenge the Postal Service's regulation suspending the PES for international remailing. The court of appeals held that the unions could do so under the APA. For the reasons given in Point A below, that ruling is in error. Moreover, for the reasons explained in Points B and C, the unions cannot bring this action and cannot prevail under the other statutes that the unions cited in their complaint. Their complaint should therefore be dismissed.

A. The Unions Cannot Bring This Suit Under The APA

1. *39 U.S.C. 410(a) precludes review under the APA of the Postal Service's action*

Both the parties and the courts below erroneously analyzed this case under the standards applicable to judicial review under the APA. Indeed, the court of appeals' treatment of the "zone of interests" standing question proceeded from its understanding, Pet. App. 6a, that "[t]he Unions' cause of action derives from § 702 of the APA, which grants standing to a person 'aggrieved by agency action within the meaning of the relevant statute.' 5 U.S.C. § 702 (1982)." That conclusion is wrong both as a factual and as a legal matter.[4]

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[4] Although we made this point in our Brief in Opposition (at 5-7), we did not make this argument in the court of appeals. Like the respondent unions, see Plaintiffs-Appellants Br. 6 & n.6, 28, we assumed that the APA applied to this case, see Appellee Br. 18 & n.13, 20 n.16, 29-30. But since "congressional preclusion of judicial review is in effect jurisdictional," *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 353 n.4 (1984), the issue cannot be waived by the parties.

The unions did not in fact rely upon the APA as a basis for their claim. Rather, the complaint sought relief under the PES and their implementing regulations, under the Declaratory Judgment Act, 28 U.S.C. 2201, and under the mandamus statute, 28 U.S.C. 1361. See J.A. 107.

Moreover, the APA is not legally applicable to the unions' complaint. Section 410(a) of Title 39 specifically precludes application of the judicial review provisions of the APA to the actions of the Postal Service challenged in this case. That law states (with exceptions not pertinent here) that "no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, *including the provisions of chapters 5 and 7 of title 5*, shall apply to the exercise of the powers of the I ostal Service" (emphasis added). Chapters 5 and 7 of Title 5 are the provisions of the APA dealing with "Administrative Procedure" (Chapter 5) and "Judicial Review" (Chapter 7). A cause of action for review of agency action is unavailable in the face of "clear and convincing evidence of legislative intention to preclude review." *Clarke*, 479 U.S. at 395 n.9. That is certainly the case here, since Congress could not have stated more clearly than it did in 39 U.S.C. 410(a) its intent to "preclude judicial review," 5 U.S.C. 701(a)(1), under the APA.[5]

[5] See *Spinks* v. *USPS*, 621 F.2d 987, 989 (9th Cir. 1980). Compare *Peoples Gas, Light & Coke Co.* v. *USPS*, 658 F.2d 1182, 1191 (7th Cir. 1981) (ruling that "nonstatutory judicial review" is available); *Lutz* v. *USPS*, 538 F. Supp. 1129, 1133 (E.D.N.Y. 1982) (suggesting without deciding that "nonstatutory judicial review" may be available); *Jordan* v. *Bolger*, 522 F. Supp. 1197, 1201-1202 (N.D. Miss. 1981) (39 U.S.C. 410(a) exempts the Postal Service from the APA, but dismissed employees are entitled to nonstatutory judicial review), aff'd summarily, 685 F.2d 1384 (5th Cir. 1982) (Table), cert. denied, 459 U.S. 1147 (1983); *Caldwell* v. *Bolger*, 520 F. Supp. 626, 628 (E.D.N.C. 1981); *NAACP* v. *USPS*, 398 F. Supp. 562, 563 (N.D. Ga. 1975). Cf. *National Ass'n of Postal Supervisors* v. *USPS*, 602 F.2d 420 (D.C. Cir. 1979) (noting that 39 U.S.C. 410(a) exempts the Postal Service from the APA, but resolving the merits of plaintiffs' claims). In *Peoples Gas*, the Seventh Circuit ruled that the Postal Service's exemption from the judicial review provisions of the APA "does not negate the applicability of common law review principles that preexisted and operate apart from the subsequent codification" of the APA. For that reason, the court held that the Postal Service could be sued for allegedly violating one of its own procurement regulations. 658 F.2d at 1191.

The APA considered as a whole, including its 1976 amendments, see H.R. Rep. No. 1656, 94th Cong., 2d Sess. 1-27 (1976); S. Rep. No. 996, 94th Cong., 2d Sess. 2-26 (1976), was designed to adopt a uniform mechanism for judicial review, cf. *Block* v. *North Dakota*, 461 U.S. 273, 280-286 (1983) (Quiet Title Act of 1972 is the exclusive means of challenging the United States' title to real property), so it is far from clear that "common law review principles" survive the APA. Cf. *Brown* v. *GSA*, 425 U.S. 820 (1976). In any event, no such basis for review has been invoked in this case. If the APA is inapplicable, a plaintiff must identify some authority for his action. In this case, none of the other statutes cited by the unions expressly or impliedly authorize this action.

The court of appeals therefore erred in relying on this Court's formulation of the "zone of interests" test in *Clarke* to evaluate the unions' standing. *Clarke* stated that the "generous" zone of interests test is "most usefully understood as a gloss on the meaning of [APA] § 702," and not as a general prudential standing requirement that applies in all cases. 479 U.S. at 400-401 n.16. See also *Lujan* v. *National Wildlife Federation*, No. 89-640 (June 27, 1990) (*Lujan* v. *NWF*), slip op. 9-10.

The court of appeals recognized that the Postal Service is exempt from the provisions of the APA. Pet. App. 4a. It observed, however, that the Postal Service has provided by regulation that "[a]mendments of the regulations [such as the one at issue here] may be made only in accordance with the *rulemaking provisions* of the Administrative Procedure Act." *Ibid.*, citing 39 C.F.R. 310.7 (emphasis added). That regulation, however, is simply a rule voluntarily adopted by the Postal Service to govern its internal operations. At most, it can be read to mean that the Postal Service has subjected itself to the provisions of *Chapter 5* of the APA, which set forth the procedures to be used by an agency when it conducts rulemaking. See 5 U.S.C. 553. Not surprisingly, the

regulation does not subject the Postal Service to judicial review under the APA of such rulemaking proceedings. The court of appeals cited no other regulation by the Postal Service committing itself to the judicial review provisions of *Chapter 7* of the APA. Accordingly, since the APA does not apply to this case, the court of appeals erred in affording the unions a right to judicial review on the basis of the APA "zone of interests" test.

2. *The interest of postal employees in job security is not within the "zone of interests" protected by the Private Express Statutes*

Even if the APA were applicable to this case, the court of appeals erred in holding that the unions can bring this action under it. Not every person suffering an injury in fact can bring suit under the APA. Parties (such as the respondent unions) can do so only if they are "adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. 702; *Lujan* v. *NWF*, slip op. 8-9, *i.e.*, only if "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Clarke*, 479 U.S. at 396 (quoting *Association of Data Processing Serv. Orgs.* v. *Camp*, 397 U.S. 150, 153 (1970)). The "zone of interests" test recognizes that, while the APA contains "generous review provisions," there is "potential for disruption inherent in allowing every party adversely affected by agency action to seek judicial review." *Clarke*, 479 U.S. at 395, 397. Accordingly, the "zone of interests" test excludes those plaintiffs "whose suits are more likely to frustrate than to further statutory objectives." *Id.* at 397 n.12 (quoting *Data Processing*, 397 U.S. at 154).

As the Court explained in *Clarke*, 479 U.S. at 399, "[t]he 'zone of interest' test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision." The inquiry is whether Congress intended that a particular class of plaintiffs would be relied on to challenge an agency's violation of a law. See *ibid.*; *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 347 (1984). Accordingly, in cases like this one, where the plaintiff is not itself the object of the challenged agency action, "the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke*, 479 U.S. at 399. Following that approach, we believe that it is quite clear that the respondent unions cannot bring this action under the APA.

a. Congress enacted the Private Express Statutes pursuant to its authority to establish "Post Offices and post Roads," U.S. Const. Art. I, § 8, Cl. 7, and the monopoly created by the PES has an ancient lineage. Postal monopolies were well established in England and Europe by the late Eighteenth Century, Act of 1710, 9 Anne 115, ch. 10, § 2; J. Johnston, *The United States Postal Monopoly*, 23 Bus. Law. 379, 380 (1968); see *United States Postal Serv.* v. *Brennan*, 574 F.2d 712, 714-715 (2d Cir. 1978), cert. denied, 439 U.S. 1115 (1979), and one was chartered under the Articles of Confederation, Act of Oct. 18, 1782, 23 J. Continental Cong. 672-673 (G. Hunt ed. 1914). The First Congress carried that law forward on a temporary basis. Act of Sept. 22, 1789, ch. 16, 1 Stat. 70; Act of Aug. 4, 1790, ch. 36, 1 Stat. 178; Act of Mar. 3, 1791, ch. 23, 1 Stat. 218. In 1792, Congress enacted its first permanent postal statute, which outlawed the private carriage of "any letter or letters, packet or packets, other than newspapers, for hire or reward." Act of Feb. 20, 1792, ch. 7, § 14, 1 Stat. 236. The Postal Act of 1845, ch. 43, § 9, 5 Stat. 735, which prohibited the establishment of any "private express," adopted the Private Express Statutes in essentially the form they have today, *United States Postal Service* v. *Greenburgh Civic Ass'ns*, 453 U.S. 114, 122 (1981); J. Johnston, *supra*, 23 Bus. Law. at 386; *The Post-Office Monopoly*, 1 Monthly L. Rep. 385, 390-392 (1849); see

18 U.S.C. 1693-1699; 39 U.S.C. 601-606, despite numerous subsequent revisions and recodifications.[6]

Throughout their history, the Private Express Statutes have been designed to serve as a revenue protection measure for the Postal Service. They facilitate the nationwide delivery of mail by protecting the Postal Service's monopoly on the carriage of letters and therefore its revenues,[7] as the federal courts have consistently recognized. See *Regents of the University of California* v. *Public Employment Relations Board*, 108 S. Ct. at 1408.[8] Congress has directed the Postal Service to "pro-

[6] See Act of Mar. 3, 1847, ch. 63, § 13, 9 Stat. 201; Act of June 27, 1848, ch. 79, § 2, 9 Stat. 241; Act of Aug. 31, 1852, ch. 113, §§ 5, 8, 10 Stat. 140, 141; Act of Mar. 2, 1861, ch. 73, § 4, 12 Stat. 204; Act of Mar. 3, 1863, ch. 71, § 31, 12 Stat. 706; Act of Mar. 25, 1864, ch. 40, §§ 2, 7, 13 Stat. 36, 37; Act of Mar. 3, 1865, ch. 80, § 10, 13 Stat. 506; Act of June 8, 1872, ch. 335, §§ 222, 224, 227-239, 17 Stat. 310, 311-312; Rev. Stat. §§ 3977-3978, 3981-3993 (1878); Act of Mar. 3, 1879, ch. 180, 20 Stat. 355-356; Act of June 11, 1880, ch. 206, 21 Stat. 177; Act of Mar. 4, 1909, ch. 321, §§ 180-186, 200, 203-204, 35 Stat. 1123-1124, 1126, 1127; Act of June 30, 1926, ch. 712, 44 Stat. (Pt. 1) 483-490, 1265-1266; Act of Feb. 6, 1929, ch. 157, 45 Stat. 1153; Act of June 22, 1934, ch. 716, 48 Stat. 1207; Act of June 29, 1938, ch. 805, 52 Stat. 1231; Act of June 25, 1948, ch. 645, 62 Stat. 776; Act of Sept. 25, 1951, ch. 413, 65 Stat. 336; Act of July 3, 1952, ch. 553, 66 Stat. 325; Act of Sept. 2, 1960, Pub. L. No. 86-682, 74 Stat. 586; Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719 (1970) (codified at 39 U.S.C. 101-5605).

[7] See, *e.g.*, H.R. Rep. No. 477, 28th Cong., 1st Sess. 1-4 (1844); S. Rep. No. 137, 28th Cong., 1st Sess. 10 (1844); *Report of Postmaster General Wickliffe to the President* 4-7 (Dec. 2, 1843), *reprinted in Message from the President to Congress*, S. Doc. No. 66, 28th Cong., 1st Sess. 596-599 (1843). Letter from Postmaster General Johnson to Congress, S. Doc. No. 373, 29th Cong., 1st Sess. (1846). See generally J. Haldi, *supra;* Craig & Alvis, 12 U.S.F. L. Rev. at 60, 70-77.

[8] See also, *e.g.*, *Greenburgh Civic Ass'ns*, 453 U.S. at 122; *Ex parte Jackson*, 96 U.S. 727, 735 (1878); *United States* v. *Bromley*, 53 U.S. (12 How.) 88, 96-97 (1851); *United States Postal Service* v. *Brennan*, 574 F.2d 712, 713-715 (2d Cir. 1978), cert. denied,

vide prompt, reliable, and efficient services to patrons in all areas and [to] render postal services to all communities." 39 U.S.C. 101(a). Moreover, since 1863 the United States has had a basic postage rate for letter mail that has not varied with the distance the letter travels. Board of Governors of the Postal Service, *Statutes Restricting Private Carriage of Mail and Their Administration*, H.R. Doc. No. 5, 93d Cong., 1st Sess. 4 (Comm. Print 1973) [hereinafter *1973 Postal Service Report*]. See 39 U.S.C. 3623(d) ("The rate for each such class [of mail] shall be uniform throughout the United States, its territories, and possessions."). Thus, it costs no more to send a first-class letter from Maine to California than it costs to send the same letter across the street.

The Private Express Statutes enable the Postal Service to fulfill its responsibility to provide service to all communities at a uniform rate by preventing private courier services from competing selectively with the Postal Service on its most profitable routes. Absent these laws, private carriers could "skim the cream" from the Postal Service's revenues by serving only selected, highly profitable areas, such as cities and other high-density regions. Under the scheme established by Congress pursuant to its express constitutional authority, these high-density regions subsidize mail deliveries to and from rural areas and between distant points, thus permitting a single postage rate to be charged nationwide. H.R. Rep. No. 477, 28th Cong., 1st Sess. 1-2 (1844); S. Rep. No. 137, 28th Cong., 1st Sess. 10 (1844); *1973 Postal Service Report* 113-117. If competitors could serve the low-

439 U.S. 1115 (1979); *United States* v. *Black*, 569 F.2d 1111, 1112-1113 (10th Cir.), cert. denied, 435 U.S. 944 (1978); *Williams* v. *Wells Fargo & Co. Express*, 177 F. 352, 357-358 (8th Cir. 1910); *Blackham* v. *Gresham*, 16 F. 609, 612 (C.C.S.D.N.Y. 1883); *United States* v. *Thompson*, 28 F. Cas. 97, 98 (D. Mass. 1846) (No. 16,489); *United States* v. *Hall*, 26 F. Cas. 75, 78 (C.C.E.D. Pa. 1844) (No. 15,281).

cost segment of the market, leaving the Postal Service to handle the high-cost services, the Service would lose lucrative portions of its business, thereby increasing its average unit cost and requiring higher prices to all users. The Report of The President's Comm'n on Postal Organization, *Towards Postal Excellence* 129 (1968). In sum, as the Second Circuit has explained, the postal monopoly "is an appropriate and plainly adapted means of providing postal service beneficial to the citizenry at large." *Brennan*, 574 F.2d at 716; *Blackham* v. *Gresham*, 16 F. 609, 612 (C.C.S.D.N.Y. 1883) (the postal monopoly exists "for the interest of all").

Under these circumstances, the unions' interest is not even arguably within the "zone of interests" protected or regulated by the PES. The unions have an interest in protecting current and future job opportunities for postal employees. Nothing in the text or legislative history of the PES, however, indicates that the PES were designed to benefit a union's interest in protecting its members' jobs.[9] Any claim to the contrary is implausible, because the PES essentially took their current shape in 1845, *Greenburgh Civic Ass'ns*, 453 U.S. at 122, when federal employees lacked any tenure protection and federal employee unions were unheard of.

The unions' interest is also not plausibly related to the revenue-protection policies of the PES. For example, the PES allow a letter to be carried by a private courier if the letter bears the required postage. 39 U.S.C. 601(a). Clearly, that provision serves the purposes of the PES, but just as clearly imperils the job opportunities of postal employees. Moreover, the Postal Service's authority to suspend the postal monopoly when "the public

[9] *American Postal Workers Union* v. *Independent Postal System of America, Inc.*, 481 F.2d 90 (6th Cir. 1973), cert. dismissed, 415 U.S. 901 (1974). Contra *National Ass'n of Letter Carriers* v. *Independent Postal System of America, Inc.*, 470 F.2d 265, 270-271 (10th Cir. 1972).

interest requires" shows that Congress imposed the monopoly not as an end in itself, but in order to further the public interest, and that the public interest at times may indicate that the monopoly is unwarranted. But according to the unions, any suspension of that monopoly endangers the job opportunities of postal employees. Thus, as the district court noted, "Service employees and their Unions will *always* have an incentive to challenge a suspension of the PES, without regard to the relationship between the suspension and the 'public interest' as contemplated by [39 U.S.C.] 601(b)." Pet. App. 32a n.2. In fact, postal employees and their unions will have an incentive to litigate "even when the 'interest' protected by the PES clearly and unequivocably favors a suspension." *Ibid.* Thus, the unions are "reliable private attorney[s] general," *Clarke*, 479 U.S. at 397 n.12 (citation omitted), only in the sense that they can be relied on to bring suit challenging virtually every suspension, and not in the sense that their suits are more likely to further than frustrate the objectives of the PES or the Postal Service in general.

The effect of the decision below, therefore, is to empower postal employees and their unions to invoke the APA to challenge any and every suspension of the PES by the Postal Service, and any and every other action by the Service that has some potential effect on its revenue. Because Congress did not remotely intend that the PES would enable postal workers to use the courts to supervise the daily financial decisions of the Postal Service, the decision below is clearly wrong. Cf. *National Fed'n of Fed'l Employees* v. *Cheney*, 883 F.2d 1038, 1041-1052 (federal employee union lacked standing under several federal laws to challenge administrative decisions to contract out work), reh'g denied, 892 F.2d 98 (D.C. Cir. 1989), cert. denied, No. 89-1501 (June 18, 1990).

b. The court of appeals relied on the Postal Reorganization Act of 1970 (PRA) in ruling that the unions met the "zone of interests" test. The court reasoned that

the PES were re-enacted by the PRA, that the unions' interest "is embraced directly by the labor reform provisions of the PRA," and that "[t]he PES constitute the linchpin in a statutory scheme concerned with maintaining an effective, financially viable Postal Service." Pet. App. 8a. The court concluded that "[t]he interplay between the PES and the entire PRA persuades us that there is an 'arguable' or 'plausible' relationship between the purposes of the PES and the interests of the Union[s]." *Id.* at 8a-9a. That conclusion is wrong, for several reasons.

This Court recently discussed the requirements of APA § 702 in *Lujan* v. *NWF*, slip op. 9-10, 12. *Lujan* explained that "to be 'adversely affected or aggrieved . . . within the meaning' of a statute" for purposes of APA § 702, "the plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statutory provision *whose violation forms the legal basis for his complaint*." *Lujan* v. *NWF*, slip op. 9 (emphasis in original and added; citing *Clarke*, 479 U.S. at 396-397). The Court reiterated that point later in its opinion, stating that "[t]he relevant statute, of course, is the statute whose violation is the gravamen of the complaint." *Lujan* v. *NWF*, slip op. 12. In this case, the "relevant statute[s]" for purposes of APA § 702 are the PES, because it is the "public interest" element of 39 U.S.C. 601(b) that the Postal Service is alleged to have violated by suspending the PES in order to allow international remailing. Compl. paras. 12-16. The court of appeals relied upon the "labor reform provisions of the PRA," Pet. App. 8a; see 39 U.S.C. 1201-1209, but the unions have asserted no violation of one of *those* laws. The court of appeals therefore simply relied on the wrong statute when performing its "zone of interests" analysis.

To be sure, the "zone of interests" test permits a court to "consider any provision that helps [it] to understand Congress' overall purposes." *Clarke*, 479 U.S. at 401.

But the court of appeals identified nothing in the labor provisions of the PRA that had any particular bearing on Congress's intent in readopting—unchanged—the PES. Indeed, that court itself noted that Congress incorporated the PES into the PRA *"without substantive modification,"* Pet. App. 8a (emphasis added). Accord H.R. Rep. No. 1104, 91st Cong., 2d Sess. 11, 44 (1970).

c. The court of appeals also held that the unions' interest in protecting the jobs of postal workers was arguably within the "revenue protective purposes" of the PES, because it "is scarcely deniable" that "postal workers benefit from the PES's function in ensuring a sufficient revenue base." Pet. App. 9a. That reasoning is also flawed, since it confuses the requirements of Article III with those of the APA.

A plaintiff must prove some injury-in-fact—some actual or threatened harm—as "an irreducible minimum" in order to establish his standing to bring suit in federal court. *Valley Forge Christian College* v. *Americans United For Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982); *Allen* v. *Wright*, 468 U.S. 737, 751 (1984). But this Court's decisions in *Clarke* and *Lujan* v. *NWF* make clear that a plaintiff must prove *more* than mere injury-in-fact to show that he is "adversely affected or aggrieved * * * within the meaning of a relevant statute" in order to bring suit under APA § 702. *Clarke*, 479 U.S. at 395-396; *Lujan* v. *NWF*, slip op. 9-10. *Clarke* and *Lujan* v. *NWF* state that in order to invoke APA § 702, the plaintiff must establish that the type of injury he has suffered or faces is one that Congress arguably sought to protect against by the statute on which he relies, and that he is the type of plaintiff that Congress designed the statute to protect. As *Lujan* v. *NWF*, slip op. 9-10, explained:

> [T]he failure of an agency to comply with a statutory provision requiring "on the record" hearings would assuredly have an adverse effect upon the company that has the contract to record and tran-

> scribe the agency's proceedings; but since the provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters, that company would not be "adversely affected within the meaning" of the statute.

See also *Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d 130, 144-145 (D.C. Cir. 1977), cert. denied, 434 U.S. 1086 (1978).

In this case, the unions alleged that the suspension of the PES for international remailing has "directly affected" the "employment opportunities" of union members by reducing the Postal Service's revenue. Compl. para. 16; Pet. App. 30a-31a, 34a. The risk that union members may lose their jobs may constitute an injury-in-fact that satisfies Article III, *National Maritime Union* v. *Commander, MSC*, 824 F.2d 1228, 1235 (D.C. Cir. 1987), but it is not the type of injury that the PES were intended to forestall, and postal workers are not the persons Congress intended to protect by the PES. The court of appeals therefore confused the injury-in-fact necessary to satisfy Article III with the type of injury required by APA § 702.

As the district court noted, accepting the unions' position "would implicitly grant standing under § 702 to *any* agency employee whose job or employment opportunities were threatened as a result of an agency decision." Pet. App. 34a n.4. Every agency daily makes innumerable decisions that affect the allocation of its resources and ultimately the job prospects of its employees. If the "zone of interests" test were satisfied by the allegation that an agency's action could reduce the number of its current or future workers, there would be few agency actions that could not be challenged by employees or their unions. As the district court correctly noted, however, "[i]t is unreasonable * * * to assume that Congress intended to make § 702 available to any disgruntled agency employee." Pet. App. 34a n.4.

B. The Unions Cannot Bring This Suit Under The Private Express Statutes

If the Court concludes that the unions cannot bring this suit under the APA, the Court could reverse the judgment below without addressing the question whether the unions could bring this action under any of the other statutes they cited in their complaint. Since the unions may rely on one of those statutes before this Court, however, we will address them in the sections below.

1. *The Private Express Statutes do not supply postal employees with an express right of action*

In their complaint, the unions sought relief under the PES, not the APA. J.A. 107. The PES, however, do not contain an express right of action authorizing postal employees (or their unions) to sue the Postal Service in federal court for improperly suspending the operation of the PES. The power to enforce the postal monopoly, like the power to enforce other criminal laws, is granted to the federal government alone. The Department of Justice has the responsibility of furnishing the Postal Service with legal representation, 39 U.S.C. 409(d), and prosecution of federal criminal cases is entrusted by other laws to the Attorney General, 28 U.S.C. 516. Accordingly, the PES do not expressly authorize the unions to bring this action.

2. *Postal employees do not have an implied private right of action under the Private Express Statutes*

Because the PES do not expressly authorize the unions to bring this action, the unions may do so only if a private cause of action can be implied under the PES. No such implied action can be found.

a. At the outset, it is doubtful that the courts should ever imply a private right of action against the federal government. The implied private right of action doctrine

has typically been invoked by a private party seeking to enforce a federal statute against another *non*-federal party. In such a case, the question arises whether Congress intended to afford the injured party the right himself to enforce a federal statute directly against a non-federal party, instead of being limited to asking the federal government to enforce that law. Without an implied private right of action, the argument goes, a private party injured by a violation of federal law would have no remedy against the responsible, non-federal party. See *Women's Equity Action League* v. *Cavazos*, No. 88-5065 (D.C. Cir. June 26, 1990).

That is generally not the case when a private party seeks to enforce a federal law against a federal agency. There is ordinarily no need for an implied private right of action in such cases, because the APA ordinarily supplies an express cause of action that is adequate to provide relief for an injured party. As Judge Breyer has explained, "[s]ince the APA offers a set of general rules for judicial review, *see* 5 U.S.C. §§ 701-706, since it incorporates by reference other, more specific statutory proceedings, *see* 5 U.S.C. § 703, and since it tends to expand relief beyond what other statutes offer, not to contract it, *see, e.g.*, § 706(2)(A) (forbidding 'arbitrary, capricious' agency action), it is difficult to imagine a case where an implied private right of action under some other statute would be of much use to a plaintiff who wants to challenge agency action." *Cousins* v. *Secretary of DOT*, 880 F.2d 603, 606 (1st Cir. 1989) (en banc). See also *NAACP* v. *Secretary of HUD*, 817 F.2d 149, 152-153 (1st Cir. 1987).

The fact that Congress has precluded judicial review under the APA—as it has done here—buttresses that analysis. Implying a private right of action against the government under such circumstances would be inconsistent with Congress's decision to withdraw the APA as a remedy for unlawful agency action. The question whether there is an implied private right of action is

ultimately a question of congressional intent. *Karahalios* v. *National Fed'n of Fed'l Employees, Local 1263*, 109 S. Ct. 1282, 1286 (1989). If Congress has withdrawn the APA as a remedy for unlawful agency action, that is a clear signal of Congress's belief that an alleged violation of federal law should be enforced through the political process, and not through the courts at the behest of private parties.

Congress designed the APA as a statute that would provide a single, uniform method for review of agency actions. *Cousins*, 880 F.2d at 606 ("The APA was designed to supplant a variety of pre-existing methods for obtaining review that differed from one agency to another and sometimes hindered the efforts of injured persons to obtain relief.").[10] Treating the APA as a law that "exhausts the field" provides a clear orderly procedural mechanism for deciding what injured parties may bring their claim against federal agencies in the courts. By contrast, allowing lawsuits seeking review of agency action "once again to proliferate under a variety of names would threaten a return to pre-APA confusion." *Ibid.*, citing *Report of the Attorney General on Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. 79-82 (1941). See pp. 10-11 & note 5, *supra*.

b. Even if it would be permissible in some case to imply a private right of action against the government,

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[10] See H.R. Rep. No. 1980, 79th Cong., 2d Sess. 275 (1946) 275 (APA §§ 701-706 "require[] adequate, fair, effective, complete, and just determination of the rights of any person in properly invoked proceedings"); S. Rep. No. 442, 76th Cong., 1st Sess. 9-10 (1939) (concerning earlier version of the APA) ("unfortunately," existing statutes do not provide for "a uniform method and scope of judicial review"); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140-141 (1967) (legislative material "manifests a congressional intention that it cover a broad spectrum of administrative actions"). Cf. *Block* v. *North Dakota*, 461 U.S. 273, 280-286 (1983) (Quiet Title Act of 1972 is the exclusive means of challenging the United States' title to real property).

it would not be appropriate to do so here. The standard for implying a private right of action is far stricter than the "zone of interests" inquiry under the APA. *Clarke*, 479 U.S. at 400-401 n.16. Thus, if we are correct that the unions' alleged injury is not within the "zone of interests" protected by the PES, it follows that the PES also do not contain an implied private right of action against the Postal Service.

The "focal point" in determining whether a private right of action is implied by a federal law, the Court has explained, "is Congress' intent in enacting the statute." *Thompson* v. *Thompson*, 484 U.S. 174, 179 (1988). The "ultimate issue is whether Congress intended to create a private cause of action," *Karahalios*, 109 S. Ct. at 1286 (quoting *California* v. *Sierra Club*, 451 U.S. 287, 293 (1981)); in the absence of such intent, "the essential predicate for implication of a private remedy simply does not exist." *Karahalios*, 109 S. Ct. at 1286 (quoting *Thompson*, 484 U.S. at 179). The factors relevant to that inquiry include the text of the statute, its legislative history, and its purpose and structure. 109 S. Ct. at 1286-1288; *Thompson*, 484 U.S. at 180-186; *Daily Income Fund, Inc.* v. *Fox*, 464 U.S. 523, 535-536 (1984); *California* v. *Sierra Club*, 451 U.S. at 293; *Cort* v. *Ash*, 422 U.S. 66, 78 (1975).[11] Under that approach, the PES do not contain an implied private right of action.

[11] *Cort* said that the question involves four factors: (1) whether the plaintiff is a member of the class for whose *especial* benefit the statute was enacted; (2) the legislative intent; (3) the consistency of such a right with the legislative scheme; and (4) whether the right of action is one traditionally relegated to state law. 422 U.S. at 78. Since *Cort*, however, the Court has made clear that its factors are only guides to congressional intent. See *California* v. *Sierra Club*, 451 U.S. at 297-298 (when the first two *Cort* factors do not suggest that the Act was intended to create an implied private right of action, "it is unnecessary to inquire further," since the last two *Cort* factors "are only of relevance if the first two factors give indication of congressional intent to create the remedy"); *Universities Research Ass'n* v. *Coutu*, 450 U.S. 754, 770-771 n.21 (1981) (where neither the statute nor its legislative history indicates an intent to create an implied private right of action, the remaining *Cort* factors cannot by themselves serve as a basis for implying one); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15 (1979) (same); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 575-576 (1979) (same).

i. The text of the PES contains no hint that Congress intended to give postal employees (or their unions) the right to sue the Postal Service for claims that the Service has improperly suspended its monopoly. As explained above, the text of the PES does not "explicitly confer[] a right directly on" postal employees or their unions. *Cannon* v. *University of Chicago*, 441 U.S. 677, 690 n.13 (1979). Rather, the statutory language does no more than outlaw the private carriage of mail over the post roads, empower the government to enforce that law, and authorize the Postal Service to suspend its monopoly when the public interest requires it. The provisions of the PES making it a criminal offense to engage in the private carriage of mail, like other criminal statutes, show that the PES were enacted for the benefit and "protection of the general public," *id.* at 690, and not postal employees or their unions. That is a powerful indication that the PES contain no implied private right of action for such a class of plaintiffs. See *California* v. *Sierra Club*, 451 U.S. at 294; *Cort* v. *Ash*, 422 U.S. at 80. See generally *Cannon*, 441 U.S. at 690 n.13 ("the right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action").

The statutory ban on the private carriage of letters can be said to benefit postal employees in an indirect manner. The PES help the Postal Service to obtain revenue and thereby to employ postal workers. In that sense, postal employees benefit from the operation of the postal monopoly.[12] But that approach to this question is clearly wrong.

[12] That reasoning persuaded the Tenth Circuit in *National Ass'n of Letter Carriers* v. *Independent Postal System of America, Inc.*,

To begin with, it is implausible to suggest that postal employees are among "the class for whose *especial* benefit the statute was enacted." *Cort* v. *Ash*, 422 U.S. at 78 (citation omitted). The PES were enacted for the benefit of the public, not postal employees. Moreover, the relevant issues are "not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries," *California* v. *Sierra Club*, 451 U.S. at 294, and whether Congress intended that such rights would "be enforced through private litigation," *Universities Research Ass'n* v. *Coutu*, 450 U.S. 754, 771 (1981); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 18 (1979). The Court has consistently ruled that statutory language of the type present here, which makes particular conduct a criminal offense, does not indicate that Congress intended to create a private right of action to enforce that law. See *California* v. *Sierra Club*, 451 U.S. at 294; *Cort* v. *Ash*, 422 U.S. at 80-85. See generally *Cannon*, 441 U.S. at 690-693 n.13 (collecting cases); *ibid.* ("the Court has been especially reluctant to imply causes of actions under statutes that create duties on the part of persons for the benefit of the public at large").

In this respect, the PES are similar to Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403, which makes it a crime to obstruct the navigable waterways of the United States. In *California* v. *Sierra Club*, *supra*, the Court held that the text of the latter statute gave no indication that Congress intended to allow private parties to enforce its terms. As the Court explained, "the statute states no more than a general proscription of certain activities; it does not unmistakably focus on any particular class of beneficiaries

470 F.2d at 270-271, which held that postal unions can bring suit under the PES against competitors. The Sixth Circuit later rejected that result and that reasoning in *American Postal Workers Union* v. *Independent Postal System of America, Inc.*, 481 F.2d at 93.

whose welfare Congress intended to further." 451 U.S. at 294. It was "the kind of general ban which carries with it no implication of an intent to confer rights on a particular class of persons." *Ibid.*

ii. The purpose and legislative history of the PES also do not support implying a private right of action against the Postal Service. Those features demonstrate that the PES were designed to benefit the public at large by protecting the Postal Service from competition by private courier services that would operate only the profitable routes. Pp. 13-16, *supra*. Also, the enforcement provisions of the PES were designed to enable the government, not postal employees, to protect its monopoly, because only the government is given such enforcement authority. Here then, as in *California* v. *Sierra Club*, 451 U.S. at 295, "Congress was not concerned with the rights of individuals." Moreover, there is no evidence that "Congress anticipated that there would be a private remedy." *Id.* at 298. Under these circumstances, there is no basis for inferring that Congress intended to allow the unions to enforce the PES in federal court. *Ibid.*; *Coutu*, 450 U.S. at 770-771 n.21; *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 575-576 (1979); pp. 24-25 & note 11, *supra*.

C. The Unions Cannot Prevail In This Suit Under The Mandamus Statute Or The Declaratory Judgment Act

In their complaint, the unions also cited the mandamus statute, 28 U.S.C. 1361, and the Declaratory Judgment Act, 28 U.S.C. 2201. These provisions do not give the unions the right to judicial review in this case.

Mandamus is warranted only if the defendant owes the plaintiff a clear nondiscretionary duty. *Pittston Coal Group* v. *Sebben*, 109 S. Ct. 414, 424 (1988); *Heckler* v. *Ringer*, 466 U.S. 602, 616 (1984). See *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 289 (1988); *Kerr* v. *United States District Court*, 426 U.S. 394, 403 (1976). In this case, the Postal Service did not

breach any clear nondiscretionary duty owed to the unions or their members. The Postal Service construed the "public interest" language in 39 U.S.C. 601(b) in suspending the operation of the PES for international remailing. The court of appeals concluded that the Service had acted arbitrarily and capriciously because it adopted an unduly "narrow interpretation of the 'public interest.'" Pet. App. 14a. But even assuming that the Postal Service's decision was incorrect, mandamus is still not available. As this Court has explained, when the existence of a duty "depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus." *Wilber* v. *United States ex rel. Kadrie*, 281 U.S. 206, 219 (1930). That is clearly the case here.

Section 601(b) does not define the term "public interest," and it entrusts the public interest determination to the judgment of the Postal Service. This Court's decisions construing similar "public interest" language in other statutes indicate that substantial deference is owed to an agency's judgment as to how the public interest is best served. See *e.g.*, *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582 (1981); *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978). Indeed, the Court has characterized the "public interest" standard of the Communications Act of 1934, 47 U.S.C. 303, as "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); *WNCN Listeners Guild*, 450 U.S. at 593. For example, in *WNCN Listeners Guild*, this Court held that the FCC's interpretation of the "public interest" in that Act, "when based on a rational weighing of competing policies, is not to be set aside by the Court of Appeals, for 'the weighing of policies under the "public interest" standard is a task that Congress has delegated to the [agency] in the first instance.'" 450

U.S. at 596 (quoting *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. at 810). The Postal Service did precisely that in this case. In deciding to suspend the PES for international remailing, the Postal Service assessed the harm of the potential loss of revenue to the Service and on balance concluded that a suspension of the PES for international remailing would best serve the public interest. Since the Postal Service's judgment was "based on consideration of permissible factors and is otherwise reasonable," 450 U.S. at 594 (*FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. at 793), the Service's view of the public interest should not be set aside at all, but clearly cannot be set aside under mandamus, even if that decision was wrong. See also *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842-843 (1984).

Even the court of appeals recognized that the "public interest" standard in 39 U.S.C. 601(b) is "sweeping," Pet. App. 12a, and confers "broad discretion" on the Service to define the "public interest." *Id.* at 14a. In fact, the court of appeals confessed "no doubt that Congress intended to confer a substantial degree of discretion on the USPS" to implement that standard. *Id.* at 13a. Under these circumstances, mandamus is clearly unwarranted.

Nor can the unions bring this action under the Declaratory Judgment Act. "[T]he operation of the Declaratory Judgment Act is procedural only." *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240 (1937). It "authorizes relief," *ibid.*, in the nature of a "declar[ation of] the rights and other legal relations of any interested party seeking such declaration," 28 U.S.C. 2201. But the Act does not itself create any legal rights, nor does it expand the authority of the federal courts to adjudicate a dispute. See *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950) ("Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction."); *Public Service Comm'n* v.

Wycoff Co., 344 U.S. 237, 242-243 (1952); *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. at 239-240; 10A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2751, at 569 (1983). The Declaratory Judgment Act therefore cannot supply the unions with an express or implied right of action to maintain this suit.

II. THE POSTAL SERVICE REASONABLY SUSPENDED ITS MONOPOLY IN ORDER TO PERMIT INTERNATIONAL REMAILING

Even if this action could be brought, the court of appeals erred in setting aside the Postal Service's considered decision to suspend its monopoly and authorize international remailing. The decisions of this Court clearly delineate the respective roles of administrative agencies and reviewing courts. Agencies have the duty to assess relevant factual and policy considerations and to "weigh the competing interests and arrive at a balance that is deemed 'the public convenience and necessity.'" *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 293 (1974) (citation omitted). Put another way, the agency's function is "not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies." *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241 (1945). An agency may render its judgment based on predictions and accumulated experience in the industry, instead of purely factual determinations. A "forecast of the direction in which [the] future public interest lies necessarily involves deductions based on the expert knowledge of the agency." *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. at 814 (quoting *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961)); *WNCN Listeners Guild*, 450 U.S. at 595.

By contrast, the function of a reviewing court is limited. See *Motor Vehicle Mfgs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Bowman Transportation, Inc.*, 419 U.S. at 285; *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971). An agency would act arbitrarily and capriciously if it relied on factors that Congress did not intend it to consider; if it completely failed to consider an important aspect of the problem; if it offered an explanation for its decision that is contrary to the evidence before the agency; or if it adopted a solution so implausible that it could not be ascribed to a difference in view or the product of agency expertise. See *State Farm*, 463 U.S. at 43. At the same time, that a court "might not have made the same determination on the same facts does not warrant a substitution of judicial for administrative discretion," *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946), particularly when the agency's decision is based on its analysis of public policy, which is "entitled to the greatest amount of weight by appellate courts." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 209 (1947).

A. The Postal Service Considered The Relevant Factors

The Postal Service started the rulemaking process with a proposed rule that was designed to make clear that the practice of international remailing was unlawful. Although the proposed rule was in accord with the Service's interpretation of the then-existing regulations regarding the scope of the postal monopoly and suspensions thereunder,[13] that proposal evoked a very strong negative response. The overwhelming majority of comments filed during the notice and comment periods criticized the rule initially proposed by the Service and urged the continuance of international remailing. Comments

[13] The Postal Service had concluded that the practice of international remailing was an abuse of the cost test used to satisfy the suspension for extremely urgent letters. See Hawley Decl. paras. 4-5, 1 C.A. App. 70-71.

cited the lower cost charged by remailers for their services,[14] the faster delivery and greater reliability of private courier services,[15] the more responsive service offered by such courier services,[16] and the benefits to the public and the Postal Service of a competitive market for international mail services,[17] all of which enhanced

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[14] See, *e.g.*, 2 C.A. App. 137 ("It was not feasible in the past to solicit orders for Mosby products via direct mail in the international marketplace due to the high cost of postage. In 1985 we discovered that by using a private remailing company we could reduce our postage costs by as much as 60% thus making it profitable to sell via direct mail overseas. If it were not for remailers we wouldn't be doing ANY direct mail, therefore, the U.S.P.S. has not been 'deprived' of anything. Furthermore, our products are mailed to our customers via the U.S. Postal Service so the orders we lose by eliminating direct mail will result in a proportionate loss of business for YOU."); 2 *id.* at 500-510 (Newsweek and other publishers would not be able to operate in Canada without cost savings from private remail.). See also, *e.g.*, 2 *id.* at 119-146, 138, 164, 205, 213, 231, 334-370, 378-384, 386-387, 390-406, 409-410, 432.

[15] See, *e.g.*, 2 C.A. App. 488-497 (in-house study by Chase Manhattan Bank found that delivery time on letters sent through the Postal Service were as much as five days longer than for those sent through a remail service); 2 *id.* at 489 ("Exhibit 1 demonstrates by summary data that, on our last two test periods, private remail service has proven to be faster. The same results have been obtained over the two year period during which we have used private remail services."); 2 *id.* at 362 ("[D]elivery time has been cut to a three to four day delivery to the door of our Nalco subsidiaries."). See also, *e.g.*, 2 *id.* at 104, 106, 108-109, 110, 119-120, 121, 138, 139-146, 248-332, 334-336, 339-340, 343-352, 354-355, 357-359, 365-367, 368-369, 378-384, 386-387, 407-408.

[16] See 2 C.A. App. 119-120 ("We have our mail collected and sorted for us. * * * We receive compensation for service failures on a weekly basis. * * * We have direct contact with our remail company's customer service and tracing department."); 2 *id.* at 166 ("Private couriers respond within 24 hours and Express Mail can take up to three weeks.").

[17] See 2 C.A. App. 180-181 (noting increase in Express Mail revenues from $133-$489 million from 1979-1984), 187, 203-210, 257, 269-271, 287-288.

the ability of American firms to remain competitive internationally.[18] See generally 2 C.A. App. 102-106, 108-110, 119-456, 470-474, 479-481, 486-534, 633-677. Executive and Legislative Branch officials also voiced strong opposition to the proposed rule banning international remailing. See 2 *id.* at 111-118, 183-211, 420-423, 428-429, 433-456, 470, 473-478.[19]

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[18] See, *e.g.*, 2 C.A. 106 ("Only by using private courier services have we been able to maintain an acceptable standard of service and compete with electronic media."); 2 *id.* at 124-125 ("[do not] restrict the activities of remailers[,] whose services my company, as do many others, need to remain competitive in the foreign markets."); 2 *id.* at 164 ("[I]f this rule change takes effect * * * we would have to sell out to a foreign publisher and the U.S. Post Office would then get none of our business."); 2 *id.* at 221-222, 273-277.

[19] See, *e.g.*, J.A. 19-40 (comments of Department of Justice Antitrust Division); J.A. 42 (Congressmen Mickey Leland, Chairman, Frank Horton, Ranking Minority Member, and Robert Garcia, Member, of the Subcommittee on Postal Operations and Services) ("Weighed against this uncertain legal authority is the certain public benefit that accrues from private sector competition in the provision of international postal services. In these circumstances, the public interest would be poorly served by amendments of the Postal Service's regulations to prohibit a specialized form of remailer competition in the provision of international mail service."); J.A. 46 (James Miller, III, Director, Office of Management and Budget) ("The proposed changes would harm consumers of international mail services by increasing their costs and reducing the quality and variety of international mail services available to them. Since most of the users of international remailers' services are U.S. firms with international activities, this action would also reduce U.S. competitiveness abroad."); J.A. 45 (Secretary of Commerce Malcolm Baldridge) ("The proposal to restrict international remail service should be put aside on the basis of business' expressed needs and U.S. trade policy."); 2 C.A. App. 450 (Beryl W. Sprinkel, Chairman of the Counsel of Economic Advisers) ("We have serious concerns about the proposed rules. Remailers offer services to United States businesses competing abroad and do so at costs and terms that are viewed by users as better than those offered by the Postal Service. Remail services benefit these users and the United

The notice and comment process worked the way it is supposed to. The Postal Service, on the basis of what it learned, changed its proposed rule. The administrative record reflects strong support for the rule ultimately adopted by the Postal Service.

The court of appeals held that the suspension of the monopoly was arbitrary and capricious because the Postal Service had failed sufficiently to consider the effect of the suspension on its revenue, the protection of which was the "core purpose of the PES." Pet. App. 14a. The court concluded that "[t]he USPS's interpretation of the 'public interest' is not reasonable since it did not give sufficient attention to how revenue losses might affect cost and service of other postal patrons." *Ibid.* Contrary to the court of appeals' conclusion, however, the Postal Service in fact adequately considered *all* of the relevant factors in suspending the PES for international remailing, including the effect of the suspension on postal revenues.

The Postal Service recognized both at the very outset of the rulemaking process and at its completion that it was difficult to assess the impact of international remailing on the Service's revenues due to the lack of comprehensive data on the number of letters or the dollars in revenue diverted from the Service by that practice. See 2 C.A. App. 114; 51 Fed. Reg. 29,636, 29,637 (1986).[20] For that reason, the Service assessed

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States economy and increase our competitiveness abroad. Thus, the proposed restrictions on remail services would reduce consumer welfare and would not accord with the policy of the Administration."); J.A. 43 (Attorney General Edwin Meese III) ("there are significant public benefits from lawful private sector competition in the provision of international postal services."); 2 C.A. App. 527 (President Ronald Reagan).

[20] In an affidavit filed in district court, Postal Service Assistant General Counsel Charles Hawley explained that "[t]he in-house data systems of the Postal Service are not designed to measure how much of the surface and air mail volume loss of recent years is due to the remail industry. The relative newness of the remail industry, combined with competition from other forms of international communication, such as electronic communication, has made such data collection infeasible." Hawley Decl. para. 12, J.A. 122. Some comments on the proposed rule addressed this question and estimated that the revenue loss from international remailing was minimal. See, *e.g.*, 2 C.A. App. 290-297 (International Remail Committee estimated that the Postal Service's proposed rule would net only $3 million, which would add little to the Service's $24 billion annual budget).

the effect on its revenues of the proposed suspension by using the most pessimistic forecast. The Service concluded that, even under the bleakest forecast, the amount of revenue that could potentially be lost by the Postal Service was not so adverse as to outweigh the benefits to the public interest from permitting international remailing. *Ibid.* In balancing the harm from the potential revenue loss against the perceived benefits to the public interest, the Service assumed that the amount of revenue diverted would be equal to the *total* amount of revenues to the Postal Service from international mail during the most recent period: *i.e.*, $882.3 million, or 3.2% of all postal revenues, 51 Fed. Reg. 21,929, 21,931 (1986); Hawley Decl. para. 12, J.A. 122—an amount that was undoubtedly overinclusive, because it necessarily included mail that was already subject to competition under the applicable laws. The Postal Service also assumed that it would lose *all* international mail volume. 51 Fed. Reg. at 21,931; Hawley Decl. para. 12, J.A. 122.[21]

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[21] In its discussion, incorporated into the final rule, of the June 1986 proposed rule, the Postal Service stated that it had used just such a "worst case scenario" figure, and explained its actions as follows, 51 Fed. Reg. 21,931 (1986):

> There is little or no reliable information as to the amount of revenues diverted to date by the activities of remailers. Estimates run from about $25 million to $500 million annually. One comment to the original proposal concluded that the net revenue loss to the Postal Service was in the neighborhood of $3 million a year. Without attempting to determine the accuracy of these estimates, we can say that the total amount of

Of course, the lack of comprehensive data is not fatal in the rulemaking process. When the available data do not settle a regulatory issue, "the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion." *State Farm*, 463 U.S. at 52. That is precisely what the Postal Service did here. Contrary to the court of appeals' determination, the Postal Service's consideration of the factors outlined above in defining the "public interest" is fully consistent with the purposes of the PES. Clearly, the Postal Service "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Ibid.* Under these circumstances, the court of appeals erred in refusing to defer to the Postal Service's judgment that the "public interest required" suspending the PES for international remailing.

B. The Postal Service Reasonably Explained Why The "Public Interest Required" The Suspension

The Postal Service engaged in precisely the type of reasoned analysis during the rulemaking process required by the APA. The Service announced its proposed rule and sought public comment. 50 Fed. Reg. 41,462 (1985). Based on those comments, the Postal Service withdrew the proposed rule and embarked on a new information gathering and rulemaking process. 51 Fed. Reg. 9852 (1986); 51 Fed. Reg. 21,929 (1986). In announcing the Postal Service's decision to reverse its proposed course and initiate a new rulemaking proceeding "to remove the cloud" over international remailing, John McKean, Chairman of the Postal Service Board of Governors, explained that, 51 Fed. Reg. at 9853:

> The remail issue has generated considerable controversy about the proper scope of the monopoly under which we operate. It is worth emphasizing that Congress entrusted us with this monopoly not for our own benefit but in order to let us better serve the American people. The critical question raised by this rulemaking is whether enforcement of the monopoly in this context would advance or retard consumer welfare and the interests of this nation.
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> * * * * *
>
> Many businesses appear to view the private sector alternative as preferable to the service we are providing—preferable in terms of price and service. That tells us something important about the way we are now doing our job in this area. The monopoly was not intended to protect us from having to face up to our own shortcomings. I am glad to say that the competition from private remailers has already spurred us on to improve our own efforts and be more competitive in providing international mail services.
>
> As things now stand, therefore, remail services would appear to advance consumer welfare while at the same time fostering innovation and economic efficiency.
>
> The Board of Governors does not believe that any attempt to suppress this kind of competition would advance the long-term objectives of the Postal Reorganization Act or otherwise enhance the welfare of our customers and the American people. Yet we have to deal with the laws and regulations now on the books. As now drafted, they do not appear to leave room for the lawful operation of international remail services. At the very least there is a serious question on this point.
>
> The Board of Governors believes that the appropriate course of action under these circumstances is to change our regulations to make them conform to sound public policy. Accordingly, we are announc-

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revenues of the Postal Service from international mail—much of which is not letters and so is not protected from competition by the Statutes—was $882.3 million for the most recently published figures. Annual Report of the Postmaster General, 1985. We conclude that the loss of revenues of what is necessarily a lesser amount is not so adverse to the Postal Service as to outweigh the perceived benefits to the public interest from allowing remailing to continue by virtue of the suspension which follows.

> ing today that the Postal Service will soon be initiating another rulemaking proceeding, this time to remove the cloud that now hangs over the international remail services and preserve the benefits of desirable competition between the Postal Service and private companies.

In the ensuing period, private parties and public officials again expressed the view that private couriers engaged in international remailing were valuable due to their lower cost, faster delivery and better overall service. 2 C.A. App. 470-474, 479-481, 486-534, 633-677. In response, the Postal Service observed in the discussion accompanying its June 1986 notice of proposed rulemaking that, 51 Fed. Reg. at 21,930:

> It is clear that the overwhelming majority of those who have commented favor a regulation which permits [international remailing] services. The reasons which they advance are several: It is faster, less expensive, more reliable, and more responsive than the air mail service provided by the Postal Service. It is said that American business is better able to compete in foreign markets when service of this nature is available. Competition in the provision of international letter delivery service is also said to be inherently beneficial, both to the customers who use this service and to the Postal Service itself.

In addition to considering the comments received from private and public parties, the Service made an independent inquiry into whether a suspension was in the public interest. 51 Fed. Reg. at 21,931. See Hawley Decl. paras. 11-12, J.A. 121-122. In so doing, the Postal Service acknowledged that, in certain respects, the comments did not contain the depth of factual analysis or the degree of precision that the Service would have liked. *Ibid.* But the Service concluded that the benefits to the public interest were nonetheless apparent in light of the consistency of comments on this subject, the reasonableness of the conclusion that the availability of international remailing services helps Ameri-

can firms in international markets, and the Service's own knowledge that the cost of remailing services is lower than the cost for services provided by the Postal Service. *Ibid.* The conclusion is inescapable that the Postal Service "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choices made.'" *State Farm*, 463 U.S. at 43.

Similarly, in issuing the final rule, the Service again carefully examined the record, weighed the competing interests and addressed the concerns raised in the comments received. See 51 Fed. Reg. at 29,636-29,637. Among the points specifically addressed by the Service was the concern raised by the unions regarding the alleged inadequacy of the record to support the conclusion that the public interest required the suspension. *Ibid.* In this regard, the Postal Service acknowledged that it had not received the "precise," "detailed" and "comprehensive" information regarding remailing that it had hoped for, but noted that such information might well be unavailable due to the "diverse character of the remail industry and the relatively recent development of remailing." *Id.* at 29,637. The Postal Service concluded, however, that the record demonstrated that the public interest requirement had been satisfied and explained in detail the basis for this conclusion, *ibid.*, excerpted at Pet. App. 36a-37a:

> The comments came primarily from American commercial enterprises, including financial institutions and publishers, that use the services of international remailers in conducting their business abroad. The comments were almost universally consistent in their observations regarding the level of service provided by remailers. Specifically, the comments asserted that remailing was faster than U.S. airmail and that this time savings is often critical to the ability of American businesses to compete in foreign markets. Moreover, the comments asserted that remailing serv-

ices were provided for a lesser cost than U.S. airmail, thereby also enhancing the ability of American firms to compete abroad. Although the Postal Service did not receive across-the-board data on the level of service provided by remailers, many commenters did provide information, testimonial in nature, indicating that their use of remail services has resulted in time and cost savings. Numerous commenters noted that this time and cost differential was critical in order for letter matter being sent abroad to retain its commercial value. Several commenters also stated that without faster and cheaper services provided by remailers, it would not be feasible for their businesses to compete in the international markets. The Postal Service found it significant that the comments received in response to the October 10 notice, which proposed language to make clear that remailing is not authorized under the suspension for extremely urgent letters, were overwhelming in their support of remailing. The Department of Commerce informed us that international remailing is of benefit to American businesses in foreign markets, a position also reflected in comments from the Department of Justice and the Office of Management and Budget.

A review of the record therefore reveals that the Service identified the relevant questions, thoughtfully considered the comments received, and arrived at a judgment that rationally accommodated the ascertainable facts with the range of permissible policy judgments the Service is authorized to make. Such action is the epitome of rational and reasoned decisionmaking under the APA. See *State Farm*, 463 U.S. at 43. As the district court summarized, Pet. App. 37a:

> The Service's explanation of its decision and the basis therefore, while perhaps lacking the factual specificity that might exist in a "regulatory utopia," can hardly be regarded as arbitrary, capricious and an abuse of discretion. * * * The Service has identified the factors supporting its decision, drawn rational inferences where detailed facts did not exist and drawn a rational connection between the facts found and the decision made. The APA requires no more.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

JOHN G. ROBERTS, JR.
Acting Solicitor General *

STUART M. GERSON
Assistant Attorney General

PAUL J. LARKIN, JR.
Assistant to the Solicitor General

MICHAEL JAY SINGER
JEFFRICA JENKINS LEE
Attorneys

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* The Solicitor General is disqualified in this case.

APPENDIX

1. 39 U.S.C. 410(a) provides:

> Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service.

2. The Private Express Statutes, 18 U.S.C. 1693-1699 and 39 U.S.C. 601-606, provide in part:

> a. 18 U.S.C. § 1696. Private express for letters and packets
>
> (a) Whoever establishes any private express for the conveyance of letters or packets, or in any manner causes or provides for the conveyance of the same by regular trips or at stated periods over any post route which is or may be established by law, or from any city, town or place to any other city, town, or place, between which the mail is regularly carried, shall be fined not more than $500 or imprisoned not more than six months.
>
> b. 39 U.S.C. § 601. Letters carrried out of the mail
>
> * * * *
>
> (b) The Postal Service may suspend the operation of any part of this section upon any mail route where the public interest requires the suspension.

3. 39 C.F.R. 320.8 provides in part:

> (a) The operation of 39 U.S.C. 601(a)(1) through (6) and § 310.2(b)(1) through (6) of this chapter is suspended on all post routes to permit the

uninterrupted carriage of letters from a point within the United States to a foreign country for deposit in its domestic or international mails for delivery to an ultimate destination outside the United States.

4. 39 C.F.R. 310.7 provides:

> Amendments of the regulations in this part and in Part 320 may be made only in accordance with the rulemaking provisions of the Administrative Procedure Act.

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